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IN THE

Supreme Court of the United States

EXXON CORPORATION,

Petitioner,

v.

ALLAPATTAH SERVICES, INC., *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

SUPPLEMENTAL BRIEF OF EXXON CORPORATION

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INTRODUCTION

As the text of the Class Action Fairness Act ("CAFA") reveals, CAFA is not retroactive. See CAFA, S. 5, 109th Cong. § 9 (2005) (enacted) (Resp. Supp. Br. App. 26a). Thus, CAFA does not apply to the instant case which – like thousands of other class actions pending in state and federal court, including all class actions recently filed in anticipation of CAFA's enactment – is governed by jurisdictional rules extant at the time the complaint was filed. Respondents nonetheless argue that CAFA's passage aids their cause in two respects.

First, they claim that Congress's 2005 enactment of CAFA – an Act that expressly amends 28 U.S.C. § 1332 to authorize federal jurisdiction over class actions seeking aggregate damages of $5 million or more – demonstrates that Congress's 1991 enactment of 28 U.S.C. § 1367 was intended to authorize federal jurisdiction over class actions including members whose claims do not satisfy the minimum-amount requirement. This argument contravenes established principles of statutory interpretation; in fact, CAFA illustrates that when Congress intends to alter the settled meaning of § 1332, it does so directly by amending § 1332, and not through enactment of a supplemental-jurisdiction statute.

Second, respondents wrongly claim that as a result of the passage of CAFA, Exxon cannot obtain relief if the Court holds that the district court lacked jurisdiction over this class action. Respondents persist in ignoring that the court tried a case over which it lacked jurisdiction to the prejudice of Exxon; the fact that the court would have jurisdiction over this action had it been filed today does not alter the court's lack of jurisdiction when this case was filed. Indeed, as Exxon showed in its brief, if the proper jurisdictional rules in effect at the time had been applied, the class at issue may not have even been certified because a number of other state law

class actions likely would have proceeded in its stead. See Exxon Reply 18. And, because the judgment is invalid, it has no collateral-estoppel effect. If this Court determines that the district court lacked jurisdiction over the class as certified and remands this action, then the court will have to apply the proper (pre-CAFA) jurisdictional rule and determine whether a class can lawfully be certified and, if so, how that class's claims will be tried.

Moreover, although respondents express certainty that the non-compliant former class members will be able to file a new multi-state class action in federal court, these former class members' claims arise under the laws of at least 35 different states, meaning that a remand might result in 35 smaller class actions where the state-law issues submerged in this federal behemoth were ignored or disregarded and where the dynamics of litigation would be entirely different.

ARGUMENT

I. THE PASSAGE OF CAFA UNDERMINES, RATHER THAN SUPPORTS, RESPONDENTS' INTERPRETATION OF § 1367.

In respondents' view, CAFA demonstrates that Congress wants diversity-based class actions seeking large aggregate damages to be resolved in federal courts; and, respondents apparently believe that the intent of Congress in enacting CAFA in 2005 is somehow relevant to discerning the intent of Congress in enacting the supplemental-jurisdiction statute in 1990. Respondents' premise is simply wrong. "[T]he view of a later Congress cannot control the interpretation of an earlier enacted statute." *O'Gilvie* v. *United States*, 519 U.S. 79, 90 (1996). See also *Firestone Tire & Rubber Co.* v. *Bruch*, 489 U.S. 101, 114 (1989) ("'the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one'") (alteration omitted) (quoting *United States* v. *Price*, 361 U.S. 304, 313 (1960)). There is no reason to

imagine that the 2005 Congress and the 1990 Congress held the same views about the proper scope of federal diversity jurisdiction. And, there is absolutely no basis for assuming that the 2005 Congress was endorsing any particular interpretation of § 1367.

Indeed, if anything, CAFA suggests that respondents are wrong. First, in CAFA, Congress decided to alter the scope of diversity jurisdiction and did so *by amending § 1332*. When Congress wants to alter dramatically the scope of diversity jurisdiction, it does so directly and unequivocally, not in the roundabout, unclear way that respondents posit in this case (*viz.*, through enactment of a supplemental-jurisdiction statute). Second, while the enactment of § 1367 was "noncontroversial," and entirely in harmony with the then-prevalent view that federal diversity jurisdiction should diminish, CAFA was hotly debated and controversial. CAFA expanded federal diversity jurisdiction in a particular context in response to an evolving view that certain state courts have not fairly managed class actions and thus were ill serving plaintiffs and wrongfully discriminating against corporate defendants. The publicity surrounding CAFA's fundamental change in diversity serves as stark contrast to the "modest" change in 1990.

More specifically, respondents first cite Exxon's showing that respondents' interpretation of § 1367 would allow a substantial, unintended expansion of federal diversity jurisdiction; they say that Exxon cannot be correct because CAFA reflects Congress's view that class action counsel have been successfully gaming the system to *avoid* federal diversity jurisdiction. Resp. Supp. Br. 2-3. Of course, there were at least three courts of appeals and numerous district courts that did *not* interpret § 1367 to overrule *Zahn* v. *International Paper Co.*, 414 U.S. 291 (1973), mitigating the inference respondents would draw.

In any event, Congress's view that class counsel have routinely been able to "game the system" to avoid federal

jurisdiction when they want to do so – *e.g.*, by ensuring that no individual makes a claim that satisfies the minimum-amount requirement or by joining parties to prevent satisfaction of the complete-diversity requirement – has no bearing on Exxon's argument. If § 1367 is interpreted to authorize federal diversity jurisdiction over a class action or multi-party case where only one plaintiff satisfies the minimum-amount requirement, that interpretation works a substantial, additional expansion in diversity jurisdiction, one not intended by the Congress that enacted § 1367. It is not relevant that respondents' interpretation of § 1367 fails to abrogate *all* limits on diversity jurisdiction; it does excise one very important limit without the slightest indication that Congress intended to do so.

Respondents next suggest that CAFA dispels any notion that Congress is hostile to diversity jurisdiction, Resp. Supp. Br. 4, as if the 2005 Congress and the 1990 Congress are the same entity and could not possibly have different views on the subject. Of course, CAFA reflects this Congress's view that, in light of certain abusive lawsuit practices in state courts, diversity jurisdiction should be expanded in the class-action setting as a partial antidote to those practices. But, respondents' triumphant quotation of the findings and purposes of CAFA casts no doubt on the validity of Exxon's demonstration that for decades, federal diversity jurisdiction was limited by Congress and by this Court, and that the 1990 Congress did not intend a dramatic expansion in diversity jurisdiction under § 1332 when it enacted the supplemental-jurisdiction statute.

In sum, CAFA is not retroactive, and the 2005 Congress is not channeling the views of the 1990 Congress that enacted § 1367. If it suggests anything, CAFA suggests that Congress knows how to alter the scope of diversity jurisdiction when it wishes to do so, and that it does not hide fundamental amendments to § 1332 in other statutes.

II. CAFA IS NOT RETROACTIVE AND DOES NOT ALTER THE APPROPRIATE OUTCOME IN THIS CASE.

CAFA applies only to cases filed after its enactment. Thousands of class actions arising in diversity jurisdiction, including this case, are governed by pre-CAFA law, and there is a conflict among the circuits on the scope of federal jurisdiction in such cases. The resolution of that conflict will decide this case and all other cases presenting the same issue and pending as of February 17, 2005.

Despite the fact that CAFA is not retroactive, respondents claim that the resolution of the supplemental-jurisdiction question presented is no longer important in this case. Respondents first contend that if this Court were to hold that the district court lacked jurisdiction, its holding would apply only to "the subclass made up of the lesser claimants." Resp. Supp. Br. 7. Of course, there is no such "subclass." The certified class was defined to include all dealers, and that is how the case was tried. In fact, as Exxon has showed, the district court lacked any jurisdiction over this class as certified and hence lacked any jurisdiction over this case. That raises the question of what occurs when the class is decertified as a proper remedy for the violation of § 1332 and the non-compliant class members are dismissed from the case. In this setting, the judgment cannot simply be affirmed because, for all the reasons set out in Exxon's opening and reply briefs, Exxon was prejudiced by the wrongful certification and the wrongful exercise of jurisdiction. See Exxon Br. 40-49; Exxon Reply 16-20. Indeed, if the district court lacked jurisdiction over the class as defined and could have certified only a class of dealers whose claims exceeded the jurisdictional minimum, the federal multi-state class action should not have been deemed superior to individual state class actions, see *In re Bridgestone/Firestone, Inc.*, 288 F.3d 1012 (7th Cir. 2002), *cert. denied*, 537 U.S. 1105 (2003).

Thus, the judgment entered was void. For two reasons, this is not a case like *Newman-Green, Inc.* v. *Alfonzo-Larrain*, 490 U.S. 826 (1978), or *Caterpillar, Inc.* v. *Lewis*, 519 U.S. 61 (1996), where, before judgment was entered, the jurisdictional defect was permissibly cured by the dismissal of the party that destroyed jurisdiction. First, as noted above, Exxon was prejudiced by the wrongful exercise of jurisdiction. But, in addition, this is a case where the district court lacked jurisdiction over the defined class itself; no party's dismissal could cure that defect because a class action is a representative suit and the fundamental alteration of a class requires a new class definition and a new class certification. See Exxon Br. 40-48; Exxon Reply 16-20. This is instead a case like *Grupo Dataflux* v. *Atlas Global Group, L.P.*, 124 S. Ct. 1920 (2004). In that case, the district court lacked diversity jurisdiction at the time of the filing of a complaint because the plaintiffs were Mexican and two members of the defendant partnership were Mexican. This Court held that the absence of diversity jurisdiction at the time of the filing of the complaint could *not* be cured retroactively by the departure of the two Mexican members of the partnership, because the same artificial entity – the partnership – remained the defendant. Similarly here, the class is an artificial entity; an alteration in its composition does not alter the fact that the court lacked jurisdiction over the class as defined. This jurisdictional defect cannot be cured by the mere dismissal of non-compliant class members; a wholly new class must be defined and certified. And thus here, as in *Grupo Dataflux*, the consequence – the vacatur of the judgment – should be ordered "regardless of the costs it imposes" if jurisdictional rules are to be taken seriously. *Id.* at 1924. This, in turn, requires that the courts to address the question whether an appropriate class of members who satisfy *pre-CAFA § 1332* can be certified; and, if such a class is certified, its claims must be adjudicated.

Moreover, plainly, a judgment entered without jurisdiction has no collateral estoppel effect. See *Restatement (Second) Judgments* §§ 1, 27 (1982) (for collateral estoppel to apply, the court must have issued a valid, final judgment, and a court cannot issue such a judgment unless it had jurisdiction). Exxon, accordingly, will not simply be deemed liable by virtue of collateral estoppel in the non-compliant plaintiffs' subsequent federal or state court actions filed after the effective date of CAFA.

Respondents assert, however, that if the non-compliant class members are dismissed, they will simply file a follow-on, federal multi-state class action raising the same claims as this federal action. But, under CAFA, it is far from clear that such a multi-state class action in federal court would be certified. As respondents themselves explain, 35 different state laws may be involved, Resp. Supp. Brief 8; the court may decide that 35 class actions based on the claims of plaintiffs in the 35 relevant states would be more manageable and superior to a single multi-state action. The court may determine that there should be 35 federal actions under CAFA. In addition, respondents claim in their Supplemental Brief that this case would support "additional state and federal claims, including state law claims for punitive damages." *Id.* This concession is startling because it clearly means that some class members would be better off pursuing individual claims; but equally to the point, state-by-state actions are likely superior because they permit each individual court the opportunity to address the significant differences in state-law standards of liability and state-law remedies. Put differently, respondents have effectively acknowledged that state laws vary and that different class members are differently situated with respect to their claims of damages from Exxon.

CAFA is not germane to Exxon's case; the judgment below was entered by a court without jurisdiction to act, and it should be vacated.

CONCLUSION

For the reasons set forth herein, and in Exxon's opening and reply briefs, the decision below should be reversed.

Respectfully submitted,

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